FEDERALLY SPEAKING

by Barry J. Lipson

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Welcome to **FEDERALLY SPEAKING,** an editorial column for **ALL** interested in the **Federal Scene**, originally compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening in the **Federal** arena, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal and related occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 44th column in this series, and together with prior columns is available on the website of the U.S. District Court for the Western District of Pennsylvania: http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm ***[note revised web address].***

LIBERTY'S CORNER

THE FEDERAL GOVERNMENT – A SURREALISTIC TREK. When last we met you were invited to participate in "the ***FBA West Penn Chapter's*** whirlwind one-day trip into the mind-bending electronic computer world of ***Tomorrow's Trials Today!!!"*** While that journey proved to be an outstanding eye-opening "surrealistic" experience, it has been **surpassed** by the reality of the trials and tribulations (and wonders) of our trek through time over the last year. This column will endeavor to examine from the Federal prospective the surrealism, the "fantastic imagery and incongruous juxtapositions," that have saturated the experience of our Federal Government's passage through time from then to now.

FIRST, THE EXPEDIENT EXECUTIVE BRANCH…

RETICENT RESERVIST OR WAR HERO? The Red States, as discussed below, have spoken! We as a nation, thanks to the swing Buckeye State of Ohio, prefer a known reticent reservist, with all his wrinkles and warts, to a war hero who was condemned for thinking ahead of the curve. The Democrats, in typical masochistic fashion, chose a shackled frontrunner who by running in front of the curve had ***too early*** condemned an unpopular war. Today's electorate seemed oblivious to the fact that his views became the views of the country, and our society matured thereby. From the beginning it appeared to some that the media images of him as a young radical espousing these advanced views would torpedo his campaign, and it appears it was his enemies from those days who finally buried him with their bizarre advertising campaign. Yet, despite expedient claims of "a political mandate" and that "I earned capital in the campaign, political capital, and now I intend to spend it," the incumbent almost lost! Nearly 50% of the electorate voted ***against*** him (and apparently really ***not for*** his opponent). Indeed the initial Ohio exit polls proclaimed the incumbent the loser; and it was a mere "eyeblink" (less than 120,000 votes), that bucked the Buckeye State into the Red camp, and the incumbent back into the White House. How is this for fantastic incongruous imagery?

THE RED STATES MENACE. Recently, in the former Red State of Latvia, President George Walker Bush acknowledged that the Red States' post-World War II domination of Eastern Europe was "one of the greatest wrongs of history," a wrong that according to a 1976 study authorized by his father, then CIA chief George Walker Herbert Bush, was supported and intensified by a "missile gap" and "military superiority" in favor of the Red States, and by the Red States' "intense military buildup in nuclear as well as conventional forces of all sorts." How ironic that President Bush now basks in the glory of the Red States' support for him as

exhibited in November 2004, and bends over backwards to curry Red States' favor. In fact, since the Revolution of 1848, "Red" has been used as the color of Socialist European Revolutionaries (see ***Class Struggles in France 1848-1850***, wherein Carl Marx referred to the "red flag" as being the flag of "the most extreme subversive party"), and with the advent of Communism became associated with such ideological Cold War labels for Communist ("Red") regimes as the Red Menace, the Red States, Red China, the Reds, etc. Indeed, the color red continues to be associated with ideologies on the left of the political spectrum, but in today's surrealistic world, thanks to the ironic *ad hoc* whimsy of our Media, Red States have also come to mean those American states that have "residents who predominantly vote for the Republican Party" presidential candidates (and Blue States the Democratic Party). Still the irony and expediency of a self-labeled "compassionate conservative" rightist basking in this "emotionally charged" leftist label, which is "used to refer to extreme radicals or revolutionaries," ***is mind-boggling.*** Indeed, by doing so is he not advertising himself as one with Communists, Socialists, Pinkos, Marxists, Bolsheviks and Bolshies? It's like the bizarreness and incredulousness of the abandoned Wal-Mart slogan: "Always the low price. Always." What ever happened to truth in advertising, political or otherwise, anyway?

A WORLD TRANSFORMED. Nearly nine decades after the association of "Red" with the left, and while the Communist left was gaining enormous growth in the Spanish Republic, expanding in a year from 25,000 to 1,000,000 members, the concept of "Weapons of Mass Destruction" (WMD) was fashioned in 1937 by the ***London Times*** to describe the NAZI right's 3 hour blanket bombing of the Spanish city of Guernica, causing the destruction of over two-thirds of this Basque holy city, the death of a third of the civilian population, and the providing of a testing ground for new military tactics and munitions. Fast forward 66 years and we see the apparent expediency of the World's Superpower using the surrealistic fear of the "Weapons of Mass Destruction" of a sanctioned, blockaded and emasculated third-rate dictatorship, to bring about the seemingly victorious and glorious invasion of that country. But then, in October 2004, Charles Duelfer, Special Advisor for Strategy to the Director of Central Intelligence regarding Iraqi Weapons of Mass Destruction, issued his final report acknowledging that, contrary to the White House's pre-invasion assertions, Iraq began destroying its WMD's in 1991 and finished doing so by 1996. Exhibiting true irony, in authentic Nostradamus-fashion, George W's Dad in his 1998 book, ***A World Transformed,*** had explained why in 1991 he stopped short of Baghdad: "Trying to eliminate Saddam, extending the ground war into an occupation of Iraq ...would have incurred incalculable human and political costs. …We would have been forced to occupy Baghdad and, in effect, rule Iraq. Under the circumstances, there was no viable exit strategy we could see, violating another of our principles. Had we gone the invasion route, the United States could conceivably still be an occupying power in a bitterly hostile land." Some say the real reason for the Iraqi invasion was for the son to finish what the father had started. Others say oil. Still others, an honest though mistaken belief. But, whatever the reason, perchance the father was right in stopping before we found ourself, as some may say we have, "an occupying power in a bitterly hostile land;" and, at a minimum, we are all victims of surrealistic puffery, but by whom?

THE THREE MUSKETEERS. Not Athos, Porthos and Aramis, but George, Bill and George, George Walker Herbert Bush, William Jefferson Clinton and George Walker Bush. An odd surrealistic trio? Two from column "Red" and one from column "Blue." Who would have guessed that they would be the Three Musketeers of the Twenty-first Century, traveling the World "faster than a speeding bullet, more powerful than a locomotive, able to leap tall buildings in a single bound," to spread "truth, justice and the American Way." Be it a massive private tsunami relief effort or the funeral of a Pope, this unlikely trio travels in synch. Jimmy Carter has expressed a desire to become D'Artagnan, the Fourth Musketeer, to join this Past and Present Presidents Club, but to no avail. Apparently the Bushes felt this trio was just right, so Bill went ***right*** in, while Jimmy was ***left*** out. Still it is heartening to see some unity of the Red and Blue "in shining White Armor." Perhaps the Country can, indeed, unite under the "Red, White and Blue."

SECOND, THE LEERY LEGISLATIVE BRANCH…

SENATOR PHIL E. BUSTER AND PROTECTION OF THE MINORITY. The longest serving member of the **U.S. Senate** is Senator Phil E. Buster, who joined that august body in 1806 when the "previous question motion" rule, that required only a simple majority to cut off debate, was eliminated. "Vrijbuiter" or

"Vrybuiter" ("pirate/freebooter") was Senator Buster's ancestral Dutch moniker, later "franconized" Flibustier and then "Spanishized" Filibustero. By the mid-1850's it had devolved to **"Filibuster"** and became his Senate ***nom de plume*** for him being prone to "pirate" that Chamber with his endless speeches to prevent votes on bills he disfavored, and in so doing allegedly protecting the rights of minorities. Indeed, it became a hallowed **Senate** tradition "that any senator should have the right to speak as long as necessary on any issue" (http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm), and in 1872 Vice President Schuyler Colfax, **President of the Senate**, so ruled ("under the practice of the **Senate** the presiding office could not restrain a Senator in remarks which the Senator considers pertinent to the pending issue"). Both Democratic and Republican Senate Leaders have strongly endorsed this as a protection of minority rights. President Lyndon Johnson, while Democratic Senate Leader stressed that in "this country, a majority may govern but it does not rule. The genius of our **constitutional** and representative government is the multitude of safeguards provided to protect minority interests." A half century later, in 1993, former Republican Senate Leader Howard Baker cautioned that limiting the right to **filibuster** "would topple one of the pillars of American Democracy: the protection of minority rights from majority rule. The **Senate** is the only body in the federal government where these minority rights are fully and specifically protected." (In the **House** debate is limited to an hour per Representative.) This Republican (and Democratic) proclaimed "pillar of American Democracy" is nicely summed up in the 1939 American movie classic ***"Mr. Smith Goes to Washington"*** where it is reported, "half of official Washington is here to see democracy's finest show, the **filibuster**. The right to talk your head off! The American privilege of **free speech** in its most dramatic form!"

THE NUCLEAR OPTION DEFUSED? The web site of the **United States Senate** defines a **"filibusters" as "any attempt** to block or delay Senate action on a bill or other matter [1] by debating it at length, [2] by offering numerous procedural motions, or [3] ***by any other delaying or obstructive actions***" (http://www.senate.gov/reference/glossary_term/filibuster.htm; emphasis added). By this definition the Republican Senate's holding up of 62 Clinton Judicial nominees, the vast majority of which, as reported by Democratic Senator Chuck Hagel, did not even receive hearings or were blocked in Committee, certainly qualifies as a **filibuster**. So does conservative Senators in the 1960's resisting **civil rights** legislation, and democratic Senators in 1991 resisting cuts in the capital gains tax. Ignoring any filibuster-type actions they and their fellow Republicans may have taken to block these 62 Clinton Judicial nominees, the leery Republican Senate leadership now tars the leery Democrats with the "crime" of **filibustering** the Bush II Judicial nominees and threatened to set off the **"nuclear option"** (a Republican-coined term), to wit, to seek an unprecedented parliamentary ruling declaring **filibusters** impermissible against ***judicial*** nominees, which ruling would then be subject to only a simple majority vote in the Senate (with VP Cheney pre-announcing he would break any tie on a partisan basis). Under the existing **Senate Cloture Rule** it takes 60 votes to end a **filibuster** (pre-1975 it took 67 votes). Democratic Leader Senator Harry Reid responded thus: "During President Bush's first four years in office, the **Senate** confirmed 204 judicial nominees and withheld its consent to only 10 nominations, a confirmation rate of over 95%…The role of the **Senate** in the confirmation of presidential nominees is a central element of our democracy. The **Framers of the Constitution** created a system of checks and balances to limit the power of each branch of government, and in that way to protect the rights of the American people. The **Senate's** review of judicial nominees is especially important because federal judges are the only government officials to receive lifetime appointments…--- while Republicans are concerned about the treatment of President Bush's judicial nominees, Democrats were concerned about the Senate's treatment of President Clinton's judicial nominees, more than 60 of whom were denied a vote by the full Senate…. Democrats in the Senate may be in the minority, but we represent millions of American citizens. The **nuclear option** would deny these Americans their rightful voice in the governance of the nation. Moreover, we will not always be in the minority. The **nuclear option** would trample on the rights of whichever group of Americans - Republicans or Democrats - happen to be represented by the **Senate** minority at any given time." Senator Reid's plea fell on deaf ears, or did it? Wonder of wonder, 14 Senators, seven from each party, stepped forward and, in the words of Republican Senator John McCain, based on "trust, respect and mutual desire to.... protect the rights of the minority," forged an understanding that busted the filibuster busters. "We have reached an agreement to try to avert a crisis in the **United States Senate** and pull the institution back from a precipice" (McCain, R-AZ). "And we have signed this document ... in the

interest of **freedom of speech, freedom of debate** and **freedom to dissent** in the **United States Senate**" (Byrd, D-WV). Under the terms of this Agreement, Democrats agree to allow certain Judicial confirmation votes; Judicial confirmations may still "be **filibustered** under **extraordinary circumstances**," with each Democratic senator having the discretion to decide when those conditions had been met; and these seven Republicans would oppose any attempt to change the **filibuster** rules. While 86 Senators have not signed on, these 14 signatories hold the "balance of power" and can thus protect this "pillar of American Democracy." What imagery!

THIRD, THE ADJUSTABLE (?) JUDICIAL BRANCH…

MALIGNING THE JUDICARY. Even before the **U.S. Constitution** was drafted there had been "past legislative interference with the judiciary," and because of this "the **Framers** enshrined in the **Constitution** separation of powers principles." (***INS v. Chadha***, 462 U.S. 919, 961,103 S. Ct. 2764, 2789 (1983), Powell, J. concurring, citing ***Federalist No. 48***, for this proposition.) Indeed, in recent times the **Federal Executive** and **Legislative Branches** have sought to "adjust" the Judiciary, mostly unsuccessfully, by for example mandating Judicial criminal sentencing (see ***Federally Speaking*** *Nos. 43, 42 36, 34, and 33*), denying access to the Courts to citizens and aliens alike (see ***Federally Speaking*** Nos. 39, 37, et al), and even utilizing the Federal Courts to manipulate the State Judiciary (***Schindler v. Schiavo***, No. 05-11628 (11th Cir. March 25, 2005)). This latter action went too far even for ultra-conservative **11th Circuit Federal Court of Appeals** Judge Stanley F. Birch, Jr., a "Bush I" appointee who has authored opinions upholding the prohibition of gay adoptions and the banning of sex toy sales. "The separation of powers implicit in our **constitutional** design was created 'to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.' ***INS***, 462 U.S. at 951, 103 S.Ct. at 2784. But when the fervor of political passions moves the **Executive** and the **Legislative** branches to act in ways inimical to basic **constitutional** principles, it is the duty of the **judiciary** to intervene. If sacrifices to the independence of the **judiciary** are permitted today, precedent is established for the **constitutional** transgressions of tomorrow. See ***New York***, 505 U.S. at 187, 112 S. Ct. at 2434. Accordingly, we must conscientiously guard the independence of our **judiciary** and safeguard the **Constitution** … Realizing this duty, I conclude that Pub. L.109-3 is an **unconstitutional** infringement on core tenets underlying our **constitutional** system"(***Schindler, supra***, Birch J., concurring). Judge Birch appears to reflect the exasperation of a considerable majority of the **Federal Judiciary**, many of them Republican appointees, over what some perceive as an attempt to emasculate the **Judicial Branch** and abort and bury not only ***Roe v. Wade***, 410 US 113 (1973), but also ***Marbury v. Madison***, 5 US 137 (1803), where by holding that **Congress** did not have the power to increase the **Supreme Court's** own original jurisdiction, the **Supreme Court** recognized its **Constitutional** power to declare **Congressional Acts unconstitutional.** (See ***Federally Speaking*** Nos. 39 & 43.) Thus, on New Year's Day 2004, **U.S Supreme Court** Chief Justice William Rehnquist "bawled out **Congress** for enacting **Sentencing Guidelines** which impinged on judicial independence and could 'intimidate individual judges'" (***Federally Speaking*** No. 36), and a year later the **Supreme Court** declared these **Guidelines** unconstitutional (***U.S. v. Booker***, 543 US __, 125 S. Ct. 738, 2005 WL 50108 (Jan. 12, 2005)). Of even greater interest is the fact that while seven **Supreme Court** Justices are Republican appointees, and five of them Reagan/Bush I appointees (six if you count Rehnquist's elevation to Chief Justice), not one of them stepped down during Bush II's first term to permit him to make an appointment, though apparently there where Justices who wanted to leave the Bench, However, due to health and age considerations it is unlikely that such "hold outs" will continue. Then too, it should be noted that Judge Birch apparently has accused his fellow Conservatives in **Congress** of being opportunists and not idealists by concluding: "Were the courts to change the law, as the petitioners and **Congress** invite us to do, an 'activist judge' criticism would be valid." More "far out" fantastic imagery?

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This Column is dedicated to the preservation of the U.S. Constitution & the Bill of Rights.

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